

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TIMESHARE UNIVERSE, INC., ET AL.,

No. C-01-1778 JCS

Plaintiffs,

v.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

STEPHEN GROSSMAN, ET AL.,

Defendants.

On September 29 and 30, 2003, the Court conducted a non-jury trial in the above matter. Pursuant to Federal Rule of Civil Procedure 52(a), the Court hereby makes the following findings of fact and conclusions of law.

**I. FINDINGS OF FACT**

**A. Introduction**

1. Plaintiffs in this action are Chris Riedel and the company he founded, Timeshare Universe, Inc. ("TSU"). In their Second Amended Complaint, Plaintiffs sued Stephen and Marian Grossman and John Wunder, alleging that these Defendants "bilked plaintiffs out of hundreds of thousands of dollars" by inducing Riedel and TSU to pay them large salaries and fees based on false promises by Defendants to raise investment funds for two internet businesses, TSU and IMYourMusic.com ("IMYM"). Second Amended Complaint ("FAC") at ¶ 1. Plaintiffs reached a settlement with the Grossmans and, thus, the only claims that remain in the case are those asserted against John Wunder, who is proceeding pro se. Those claims arise only out of Plaintiffs' investment in TSU.

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**B. The Parties**

2. TSU is a Delaware corporation that was founded by Chris Riedel in 1999. Chris Riedel is an individual who resides in Los Gatos, California. Defendant John Wunder is an individual who resides in Florida.

**C. IMYM**

3. In 1999, IMYM's founders, Helen and Alan Pollack hired Stephen Grossman to raise capital for IMYM. Grossman, in turn, persuaded the Pollacks to hire William White as an employee of IMYM. Subsequently, White and Grossman, on behalf of IMYM, negotiated a consulting agreement with John Wunder, who was introduced to the Pollacks as a friend of White's.

4. On June 9, 2000, John Wunder was terminated by IMYM. Helen Pollack testified that when her husband told Wunder he was being terminated, Wunder began to "yell and scream and make a scene." She testified further that her husband called the police, who escorted Wunder out of the building. On June 30, 2000, IMYM made a final payment to Wunder of \$2,506.03, settling all outstanding obligations to Wunder. After June 30, 2000, Wunder had no further involvement with IMYM.

5. In June 2000, White wrote a memorandum to IMYM's board of directors alleging that Allen Pollack had breached his fiduciary duty to IMYM by committing forgery on a wire transfer and charging personal expenses on the company credit card. In response, Allan Pollack directed White to take a few days off and then locked White out of the building. By July 2000, Helen Pollack had taken over White's duties, and White was no longer actively working for IMYM. White did not return to work at IMYM and was terminated in October 2000.

6. Chris Riedel met Grossman in 1998, when Grossman was managing director of Lincolnshire. Later, when Grossman was working for IMYM, he solicited investment in IMYM from Chris Riedel. In January or February 2000, Chris Riedel purchased \$100,000.00 worth of stock in IMYM.

**D. TSU**

7. In the Spring of 1999, Chris Riedel came up with the idea for TSU of creating a company that would bring liquidity to the timeshare industry. Soon thereafter, Chris Riedel formed

1 TSU, which was incorporated in Delaware. Chris Riedel was CEO and the Board of Directors  
2 included Chris and Marcia Riedel, Stephanie Ross, Mark Benson and Burt Denton. Riedel created a  
3 management team that included himself, David Oke, Robert Sanford, Mark Benson and his wife,  
4 Marcia Riedel. Chris Riedel and David Oke drafted a mission statement and Riedel raised  
5 \$110,000.00 in "seed money" from friends and acquaintances who were interested in TSU.

6 8. For approximately a year, from the Spring of 1999 to the Spring of 2000, Chris  
7 Riedel attempted, unsuccessfully, to arrange meetings with venture capitalists to raise additional  
8 capital for TSU. Riedel was unable to interest any venture capitalists in meeting with him to discuss  
9 TSU or in investing in TSU.

10 9. In the Spring of 2000, Chris Riedel became frustrated that he had been unable to  
11 interest venture capitalists in investing in TSU. Riedel testified that at this point, he was on the  
12 verge of abandoning the idea, having spent \$90,000.00 of the \$110,000.00 in "seed money." Mr.  
13 Oke testified that around this time, it was a "coin-flip" as to whether Riedel and the other individuals  
14 who helped create TSU were going to go forward. He testified that in early summer 2000, Riedel  
15 told Oke that he had decided to give up on the idea altogether because of the failure to obtain  
16 funding for the company and that Oke, in turn, convinced Riedel to give it "one last shot" by talking  
17 to Grossman.

18 10. Around this time, Riedel expressed his frustrations with respect to raising funds for  
19 TSU in a conversation with Grossman. Grossman, in turn, said that he might be able to help, and  
20 asked Riedel to send him the TSU business plan. Grossman was enthusiastic about TSU and in June  
21 2000, sent White and Wunder on his behalf to California to conduct due diligence on TSU. White  
22 and Wunder spent two days conducting due diligence, and they too were "emphatic" in their  
23 conversations with Riedel that the TSU was a "great concept."

24 11. On July 12 and 13, 2000, TSU representatives met with Grossman, White and  
25 Wunder to discuss the possibility of employing Grossman to raise funds for TSU. Chris and Marcia  
26 Riedel, and TSU's attorney, Graham Taylor, participated for the entire two days. In addition, David  
27 Oke was present for the first day and Stephanie Ross was present for the first two hours of the first

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1 day of the meeting. Statements made by Grossman at this meeting concerning Wunder's  
2 employment with IMYM are a key issue in dispute between Plaintiffs and Wunder.

3 12. Based on the testimony offered by the Riedels, David Oke, Graham Taylor, Stephanie  
4 Ross, and William White, the Court finds that: 1) Grossman insisted that he could not raise funds for  
5 TSU without White and Wunder and that he would only agree to work for TSU if White and  
6 Wunder also were hired; 2) White and Wunder allowed Grossman to negotiate their compensation  
7 packages with TSU, which was a subject of heated negotiation, on their behalf; 3) Grossman told the  
8 TSU representatives that White and Wunder were still employed and in good standing at IMYM and  
9 that they would have to be offered large salaries to induce them to leave IMYM; 4) White and  
10 Wunder were present throughout these discussions, but neither revealed to TSU representatives that  
11 Wunder had been terminated by IMYM and White's position at IMYM was tenuous; and, 5) TSU  
12 and Riedel would not have hired White and Wunder, and would not have entered into the agreement  
13 with Grossman had they known the truth. In particular, these findings are based on the following  
14 testimony regarding the meetings on July 12 and 13:

15 William White: White testified that at the meeting, Grossman stated that he could raise 1-2  
16 million dollars immediately and a total of 8 million dollars within 90 days, so long as White  
17 and Wunder also were hired to assist him. White testified that Grossman told White and  
18 Wunder during a break that he would negotiate White's and Wunder's salaries, and White  
19 and Wunder allowed Grossman to do so. White testified that he and Wunder were present  
20 for the entire time in which their salaries were being negotiated. According to White,  
21 Grossman implied that White and Wunder were still employed by IMYM, and told the TSU  
22 representatives that White and Wunder would have to be offered large salaries to lure them  
23 away from IMYM. White testified that during a break, he told Grossman that he was  
24 uncomfortable with Grossman's negotiating strategy because Grossman hadn't told TSU that  
25 White and Wunder were no longer employed in good standing with IMYM. According to  
26 White, Wunder was present when White had this conversation with Grossman, but Wunder  
27 said nothing. According to White, neither Grossman, nor White, nor Wunder revealed that

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1 Wunder was no longer employed by IMYM and that White's position with IMYM was  
2 tenuous.

3 Chris Riedel: Riedel testified that Grossman said that he could raise 8 million dollars, but  
4 that he would only agree to work for TSU if White and Wunder were also hired. According  
5 to Riedel, there was a lot of discussion regarding Wunder and White's employment with  
6 IMYM and the need to pay White and Wunder large salaries to lure them away from IMYM.  
7 Riedel testified that White said that he was not sure he would be able to get out of his IMYM  
8 contract and that Grossman said to "leave it to him." Riedel testified that Wunder was  
9 present during this conversation but said nothing. Riedel testified that he was "shocked" at  
10 the high salaries Grossman was seeking for White and Wunder and that he and the other  
11 board members thought the amounts sought were "ludicrous," but that Grossman persuaded  
12 TSU to pay these salaries by promising he could raise the capital in a short time and by  
13 refusing to enter into an agreement without White and Wunder. Riedel testified that he  
14 would not have hired White and Wunder had he known that Wunder had been fired by  
15 IMYM and that White was not in good standing with IMYM. Grossman would not have  
16 entered into the TSU agreement unless White and Wunder were hired by TSU.

17 Stephanie Ross: Ross testified that while she was at the meeting on July 12, Grossman stated  
18 that he could raise between 2 and 8 million dollars for TSU, and that White and Wunder  
19 would have to be hired to assist him. Ross testified that Grossman implied that White and  
20 Wunder were still employed by IMYM and that it would be a big sacrifice for them to come  
21 to TSU. Ross also testified that no one told the TSU representatives that White and Wunder  
22 had been fired and that if they had known that White and Wunder were fired for cause, the  
23 TSU representatives would not have hired them.

24 Graham Taylor: Taylor testified that he became TSU's attorney in the summer of 2000 and  
25 that he participated in the July 12-13 meeting in that capacity. Taylor testified that  
26 Grossman said he could raise 8 million dollars but that he would need White and Wunder in  
27 order to do so. Taylor testified that Grossman said White and Wunder would have to  
28 "extricate themselves" from their employment agreements with IMYM and therefore, that

1 TSU would have to offer them competitive salaries. According to Taylor, no one told the  
2 TSU representatives that Wunder had been fired by IMYM or that he had been escorted from  
3 the building by police. Taylor testified that if he had known of these facts, he would have  
4 advised Riedel and TSU not to go through with the deal and to investigate White and  
5 Wunder.

6 David Oke: Oke testified that Grossman negotiated White's and Wunder's salaries.

7 According to Oke, Grossman said that White and Wunder were employed by IMYM and that  
8 they would need to be paid well because they were walking away from a "nice package."

9 Marcia Riedel: Marcia Riedel testified that Grossman told the TSU representatives that  
10 White and Wunder were employees of IMYM and that it would be difficult from them to get  
11 out of their employment agreements with IMYM. Marcia Riedel testified that she and her  
12 husband made financial decisions jointly, and that she would not have agreed to put more  
13 money in TSU if she had known that White and Wunder were no longer employed and in  
14 good standing with IMYM.

15 13. In contrast to the testimony cited above, Grossman testified that it was not he but  
16 rather White who negotiated White's and Wunder's salaries. According to Grossman, later in July,  
17 he had a conversation with Riedel in which he told Riedel that he was "uncomfortable with the lack  
18 of disclosure" at the July meeting regarding White's and Wunder's employment status with IMYM.  
19 As discussed below, the Court does not find this testimony credible.

20 14. Believing Grossman's statements concerning White's and Wunder's employment  
21 with IMYM to be true, and unaware of Wunder's termination by IMYM, Riedel agreed to hire  
22 Wunder, White, and Grossman. The terms of the agreement reached by Riedel, Grossman, White,  
23 and Wunder on July 12, 2000, were set forth in a document entitled, Summary of Terms (hereinafter,  
24 "the TSU Agreement"). Under the express terms of the TSU Agreement, Grossman, White and  
25 Wunder were hired as Chairman of the Board, Chief Operating Officer and Vice President,  
26 respectively. White and Wunder were to be paid annual salaries of \$225,000.00 and \$175,000.00,  
27 respectively. Riedel was to invest up to \$250,000.00 to provide corporate funding for the ensuing  
28 three months.

1           15.     Following the July 12 meeting, Riedel provided \$250,000.00 in corporate funding, as  
2 required under the TSU Agreement. Riedel also paid \$26,586.00 directly to Wunder to cover  
3 Wunder's expenses after TSU's funds had run out. Riedel made these payments in response to a  
4 series of e-mails from Wunder asking Riedel to cover his expenses. In several of these e-mails,  
5 Wunder expressed confidence in Riedel's efforts with respect to TSU. However, Grossman and  
6 White testified in their depositions that during the time period when Wunder was sending these e-  
7 mails, Wunder was highly critical of Riedel in statements to them.

8           16.     There is conflicting evidence regarding the parties' understanding with respect to the  
9 principal place of business of TSU once the company was launched. Riedel testified that all of the  
10 parties agreed at the time they entered into the TSU Agreement that TSU was to be based in  
11 California, even though the agreement itself does not address this issue. On the other hand, the  
12 evidence reflects that Riedel did not object to opening a Florida office from which Grossman was to  
13 work. It was also contemplated that White might work from Pennsylvania.

14           17.     In an August 14, 2000 memorandum to a potential investor, Ronald Sedley,  
15 Grossman proposed creating a parent corporation which would encompass TSU, as well as other  
16 ventures, to be headquartered in Florida. Grossman was to have a controlling interest in the entity,  
17 and Riedel was to have "some participation." Under the proposal, Wunder and White were to be  
18 given incentive options in TSU in addition to their salaries and compensation from TSU.

19           18.     In a letter dated October 12, 2000, purportedly memorializing an understanding  
20 reached during a discussion between Grossman and Riedel, Grossman stated that the offices of TSU  
21 would be located in Boca Raton, Florida. Riedel, however, testified that the letter misrepresented  
22 the content of the discussion between Riedel and Grossman.

23           19.     In light of the conflicting evidence, the Court cannot find by a preponderance of the  
24 evidence that Riedel, Wunder, Grossman, and White had an agreement that TSU would always be  
25 based in California. Rather, the Court concludes that the expectations of these individuals diverged  
26 with respect to the ultimate location of TSU.

27           20.     The Court also is not persuaded that Wunder participated in Grossman's efforts – as  
28 reflected in the August 14, 2000 memorandum – to take control of TSU. While Wunder is included

1 in the proposal described in the memorandum, there is no evidence that Wunder participated in  
2 developing the proposal or was even aware of it. Thus, the Court cannot find by a preponderance of  
3 the evidence that Wunder was engaged in efforts to gain control over TSU.

4 **E. Specific Credibility Findings**

5 21. The Court finds credible Helen Pollack's testimony regarding the circumstances of  
6 Wunder's termination from IMYM, and in particular, Pollack's testimony that her husband Allen  
7 called the police. The Court also finds credible Helen Pollack's testimony that this incident  
8 occurred in June and not earlier, as William White testified. Conversely, the Court does not find  
9 credible William White's testimony that the incident with the police occurred before June 2000 and  
10 that Wunder's termination was "amicable."

11 22. Grossman's testimony that White, and not Grossman, negotiated White's and  
12 Wunder's salaries, is not credible. This testimony was contradicted by every other testifying  
13 witness, all of whom testified that Grossman negotiated White and Wunder's salaries. Similarly,  
14 Grossman's testimony that he later had a discussion with Riedel in which he stated he was  
15 uncomfortable with White's failure to reveal White and Wunder's true employment status also is not  
16 credible.

17 23. Oke's testimony was credible in all respects. Oke appeared honest and thoughtful.  
18 Oke's testimony confirms Riedel's testimony that at the time when Grossman offered to help raise  
19 funds for TSU, Riedel had decided to abandon the idea.

20 24. Chris Riedel's testimony was credible in all respects. Based on Riedel's demeanor,  
21 the Court concludes that Riedel testified truthfully. In particular, the Court finds credible Riedel's  
22 testimony that he wouldn't have invested any additional funds in TSU if Grossman, White, and  
23 Wunder had not persuaded him to enter into the TSU Agreement.

24 25. Graham Taylor was a very credible witness. Taylor's account of the July meeting  
25 corroborated the testimony of a number of other witnesses. The Court found particularly credible  
26 Taylor's testimony that if he had known that White and Wunder had left IMYM under a cloud, he  
27 would have advised his client not to enter into the TSU Agreement.

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2           26.     The testimony of Stephanie Ross was credible in all respects. In particular, Ross's  
3 testimony that she would not have agreed to go forward with the agreement with Grossman if she  
4 had been aware of the true employment status of White and Wunder with IMYM was credible.

5           27.     Marcia Riedel's testimony regarding the events of the July meeting was credible.

6           **F.     Claims Against Wunder**

7           28.     Riedel and TSU assert the following claims against Wunder. First, Plaintiffs allege  
8 that Wunder committed fraud and/or negligent misrepresentation in inducing Plaintiffs to enter into  
9 the agreement with Wunder, White, and Grossman based on Grossman's false representations  
10 concerning Wunder's employment with IMYM. Second, Plaintiffs allege Wunder committed fraud  
11 and/or negligent misrepresentation in inducing Plaintiffs to continue to make payments to Wunder  
12 after entering into the TSU Agreement with Wunder while at the same time privately criticizing  
13 Riedel. Third, Plaintiffs allege that Wunder is liable for conspiracy to defraud in that he conspired  
14 with Grossman and White to allow Grossman to negotiate the agreement under which the three men  
15 were retained by TSU. Because of this conspiracy, Plaintiffs argue, Wunder is responsible for any  
16 losses caused by Grossman during the course and furtherance of the conspiracy. Finally, Plaintiffs  
17 bring a breach of contract claim against Wunder, alleging that Wunder failed to perform under the  
18 agreement because he, along with Grossman, sought to gain control over TSU.

19           **II.     CONCLUSIONS OF LAW**

20           29.     Under California law, a defendant is liable for fraud where a plaintiff establishes the  
21 following elements: 1) a misrepresentation; 2) knowledge of falsity; 3) intent to defraud; 4)  
22 justifiable reliance; and, 5) resulting damage. *Cicone v. Urs Corp.*, 183 Cal. App. 3d 194, 200  
23 (1986). Deliberate silence in the face of a false statement by another may constitute a  
24 misrepresentation. *Rivett v. Nelson*, 158 Cal. App. 2d 268, 275 (1958).

25           30.     “Negligent misrepresentation requires justifiable reliance on a misrepresentation of  
26 fact where the defendant has no reasonable grounds for believing the representation to be true and  
27 intends to induce reliance by the plaintiff.” *Fox v. Pollack*, 181 Cal. App. 3d 954, 962 (1986).

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1           31.     “Liability for civil conspiracy generally requires three elements: (1) formation of the  
2 conspiracy (an agreement to commit wrongful acts); (2) operation of the conspiracy (commission of  
3 the wrongful acts); and (3) damage resulting from operation of the conspiracy.” *People v.*  
4 *Beaumont Inv., Ltd.*, 3 Cal. Rptr. 3d 429, 456 (2003) (citing *Applied Equip. Corp. v. Litton Saudi*  
5 *Arabia Ltd.*, 7 Cal. 4th 503, 510-511 (1994)).

6           32.     The elements for breach of contract under California law are: 1) the existence of the  
7 contract; 2) performance by the plaintiff or excuse for nonperformance; 3) breach by the defendant;  
8 and, 4) damages. *First Commercial Mortgage Co. v. Reece*, 89 Cal. App. 4th 731, 745 (2001).

9           33.     Plaintiffs have established by a preponderance of the evidence that all of the elements  
10 for fraud and negligent misrepresentation have been met. In particular, Wunder’s conduct at the  
11 July 12, 2000 meeting was tantamount to an affirmative representation that the statements were true  
12 and, as such, constitutes a misrepresentation. John Wunder knew the statements by Grossman were  
13 untrue, but, in order to induce Chris Riedel to enter into the TSU Agreement, did not inform Riedel  
14 or TSU that the statements were false. Moreover, Wunder authorized Grossman to make the  
15 statements on his behalf. Unaware that Wunder had been terminated by IMYM, Riedel entered into  
16 the TSU Agreement, under which Riedel agreed to hire Wunder, White, and Grossman. Had he  
17 know the true circumstances regarding Wunder’s termination by IMYM, Riedel would not have  
18 entered into the TSU Agreement. As a result, Riedel and TSU suffered damages in the form of the  
19 salaries and expenses paid to Grossman, White, and Wunder.

20           34.     Plaintiffs have established by a preponderance of the evidence that all of the elements  
21 for conspiracy to defraud have been met. Formation of a conspiracy was established with evidence  
22 that Grossman told White and Wunder to allow him to negotiate their salaries. Wunder, by his  
23 silence, agreed. Operation of the conspiracy was established with evidence that Wunder sat through  
24 the negotiation, aware that Grossman had misrepresented Wunder’s employment status, and did  
25 nothing to correct this misrepresentation. Damage was established with evidence that Plaintiffs  
26 entered into the TSU Agreement, and invested tens of thousands of dollars, neither of which they  
27 would have done had they been aware of the true facts.

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35. Plaintiffs have not established by a preponderance of the evidence that Wunder breached his agreement with TSU by engaging in a scheme, along with Grossman, to take control of TSU and move the company to Florida. As noted above, there is insufficient evidence of Wunder's involvement in efforts to take over the company or move it to Florida. Moreover, there is no resulting damage, as Grossman was not successful in either moving or taking control of the company.

### **III. DAMAGES**

For the forgoing reasons, the Court finds in favor of Plaintiffs and against Defendant Wunder and awards the following damages:

1. As a proximate result of Wunder's conduct, TSU suffered damages in the amount of \$167,045.00. This amount includes \$141,464.00 in damages and \$25,581.00 in prejudgment interest. The damages figure, in turn, includes all of the expenses listed in Exhibit 52, from which the Court subtracts: a) the amount of \$19,704.00, listed in that exhibit as "Beginning Bank Balance," which is not properly considered an expense; and b) the offset resulting from the settlement with Grossman. Prejudgment interest is calculated at a rate of 7% for a period of 31 months, as stipulated by Plaintiffs. *See Mutuelles Unies v. Kroll and Linstrom*, 957 F.2d 707 (9th Cir. 1992) (holding that in diversity jurisdiction, state law governs awards of pre-judgment interest); *In re Ekrem*, 192 B.R. 982 (C.D. Cal. 1996) (holding that under Cal. Civ. Code § 3288, court, as trier of fact, could in its discretion award prejudgment interest to make plaintiff in fraud action whole and awarding prejudgment interest at the California rate of 7%).

2. As a proximate result of Wunder's conduct, Chris Riedel was damaged in the amount of \$47,967.81. This amount includes \$40,622.00 in damages and \$7,345.81 in prejudgment interest. The damages figure includes two components: a) \$26,586.00 in direct payments by Chris Riedel to Wunder, which are not subject to offset from the Grossman settlement, as reflected in Exhibit 53; and b) \$28,361.00 in payments by Chris Riedel for TSU expenses. The latter expenses are reflected in Exhibit 54, but the Court has omitted the litigation-related expenses listed in that exhibit consistent with the attachment to Plaintiffs' Post-Trial Brief, in which Plaintiffs have circled the litigation-related expenses listed in Exhibit 54. This amount is also reduced by the offset resulting

1 from the Grossman settlement. Prejudgment interest is calculated at a rate of 7% for a period of 31  
2 months, as stipulated by Plaintiffs. *See id.*

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5 IT IS SO ORDERED.

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7 Date: October 21, 2003

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9 JOSEPH C. SPERO  
United States Magistrate Judge